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CIVIL LAW PROPERTY

*Joseph Dainow**

CLASSIFICATION

Movables and Immovables

In *Chestnut v. Hammatt*,¹ the plaintiff purchased a tract of land and the improvements thereon. In dispute was the passing of a refrigerated bulk milk tank and a vacuum pump, situated in the dairy barn. The manner in which these things were connected to the property was not of serious concern because they were classified as immovables by destination under Civil Code article 468. Belonging to the vendor-landowner, and being essential equipment in the dairy operation, they constituted "other machinery made use of in carrying on the plantation works" within the meaning of the article. While still owner of both the land and the improvements, the vendor could have de-immobilized such improvements by alienation and removal, but not by a disposition which left the improvements on the land without any notice of the vendor's intent to exclude them from the sale. Accordingly, they passed with the sale of the property to the vendee.

In *Industrial Outdoor Displays v. Reuter*,² the defendant purchased a tract of land and resisted the plaintiff's demand for permission to remove an outdoor advertising sign structure which had been placed there under the terms of an unrecorded lease with the prior owner. The structure consisted of two large steel "H" beams imbedded in concrete together with sign faces and other equipment fastened with bolts to the steel beams. The trial court held that the steel beams had become immovable by destination but that the sign faces and equipment remained movables because they could be unbolted and removed without any effect on the real property.

The court of appeal took a different approach and, treating the whole sign structure as a single entity, classified it as an immovable by nature as constituting a "construction" within

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1. 157 So.2d 915 (La. App. 1st Cir. 1963).

2. 162 So.2d 160 (La. App. 4th Cir. 1964), rehearing denied, writ refused, 164 So.2d 352.

the meaning of Civil Code article 464, and a part of the landed estate *quoad* the purchaser without recorded notice of the lease.

It is not clear to what extent this holding is predicated upon the fact that the plaintiff's lease was unrecorded and not binding on the vendee-defendant. For purposes of immovable classification under article 464 there is no question of ownership of the building or construction, or unity of ownership with the land.³ If the lease had been recorded, it would have constituted a constructive notice to the purchaser, and the court would probably not have reached the same decision.

OWNERSHIP

Lake versus River or Stream

Many rules of property law pertain to land in the vicinity of water, including land adjacent to or under water, and deal with changes from submerged to emerged land (and vice versa). These rules often vary according to the nature of the body of water, especially the degree to which it is navigable. Of prime importance is the legal distinction between a river or stream and a lake. This classification is not necessarily coincident with the name on a map, nor is it governed by dictionary definitions or the tests of geologists or historians: it is a legal classification made by courts in order to determine which property laws are applicable to the case. With the wide range of different kinds of bodies of water in Louisiana, there seems to be no end to the problems of their classification — unless the latest case will be of substantial help on that issue.

*State v. Cockrell*⁴ pivoted on the problem of classifying the body of water known as Six Mile Lake: was it a "lake" or a "river or stream" for legal purposes? In the latter case, the property rules of accession in relation to alluvion⁵ would apply; in the former, they would not. Within relatively recent years, several cases⁶ have dealt with this question, but the present case

3. *Scardino v. Maggio*, 131 So. 217 (La. App. 1st Cir. 1930); *Vaughn v. Kemp*, 4 La. App. 682 (2d Cir. 1926).

4. 162 So. 2d 361 (La. App. 1st Cir. 1964), *writ refused*, "no error of law," 246 La. 343, 164 So. 2d 350.

5. LA. CIVIL CODE arts. 509, 510 (1870).

6. *Zeller v. Southern Yacht Club*, 34 La. Ann. 837 (1882); *State v. Erwin*, 173 La. 507, 138 So. 84 (1931); *Miami Corp. v. State*, 186 La. 784, 173 So. 315 (1936); *Amerada Petroleum Corp. v. State Mineral Board*, 203 La. 473, 14 So. 2d 61 (1943); *Esso Standard Oil Co. v. Jones*, 233 La. 915, 98 So. 2d 236 (1957); *State v. Aucoin*, 206 La. 787, 20 So. 2d 136 (1944).

provides the occasion for the most comprehensive contribution to the law on the subject. In deciding that Six Mile Lake was a "river or stream" within the meaning of Civil Code article 509, the court made a thorough survey of the jurisprudence and established a substantial number of objective physical factors, which, it is hoped, will facilitate the answers to future questions of the same sort. The matter is fully discussed elsewhere in this *Review*.⁷

USUFRUCT

In *State v. Costello*,⁸ the husband as surviving spouse was perfect owner of an undivided one-half interest in certain realty and usufructuary of the other half to which his children had the naked ownership. When the Department of Highways expropriated this property and deposited the money in court, the children claimed their half. They contended that the usufruct had terminated by "the loss of the thing subject to the usufruct" under Civil Code article 613, but the court properly held that this was not a loss of the property within the contemplation of the article. The father was entitled to have the usufruct of his wife's half of the community until his death or remarriage,⁹ and the expropriation merely changed the base of his right from the property to the proceeds. Consequently, the father was entitled to receive one-half of the money as his own, and the other half as usufructuary. The children's rights as naked owners of this half were changed from the direct right in the property of a perfect usufruct to the claim for restoration of the same sum of money at the termination of what had become an imperfect usufruct.¹⁰

The problems concerning the partition of land subject to a usufruct are varied. The owner of an undivided share in the naked ownership can obtain a partition, by licitation if necessary.¹¹ By the same reasoning, the owner of an undivided share in the usufruct might obtain a partition by licitation,¹² if it is not feasible for him to get an identified share of the enjoyment and fruits. But the naked owner cannot demand a partition against the usufructuary because they are not co-owners of the

7. See Note, 25 LA. L. REV. 554 (1965).

8. 158 So. 2d 850 (La. App. 4th Cir. 1963).

9. LA. CIVIL CODE art. 916 (1870).

10. *Id.* arts. 534, 549 (1870).

11. *Smith v. Nelson*, 121 La. 170, 46 So. 200 (1908).

12. LA. CIVIL CODE art. 1309 (1870).

same property interest.¹³ In *Fricke v. Stafford*,¹⁴ a partition of realty was demanded by a person who had an undivided interest in the perfect ownership of a tract of land, and at the same time he also had an undivided interest in the naked ownership of the remaining fraction of the same land. The court held that he could not obtain a partition by licitation as long as an undivided portion of the property was subject to a valid usufruct. A fuller analysis and critical evaluation of this problem has been published elsewhere in this *Review*.¹⁵

In *Humble Oil & Refining Co. v. Boudoin*,¹⁶ a man sold by warranty deed to a child of his second marriage certain property which had been acquired during his first marriage. There was an unconditional acceptance of his succession by all the children of both marriages. Then the children of the first marriage claimed as belonging to them what had been their mother's half of the community and on which the father had enjoyed a legal usufruct. The problems involved are complicated; after a hearing, a rehearing, and a denial of further rehearing, the court rendered judgment sustaining the ownership of the son-vendee. It is not feasible in these comments to discuss fully all the issues involved, especially all the criss-crossing arguments about warranty and estoppel; but there is a point concerning usufruct that should be clarified.

When Pierre Boudoin's first wife died, he acquired the usufruct of her undivided half of the property; and when he remarried, this usufruct terminated.¹⁷ At this point, he was under an obligation to deliver to the children of the first marriage the *possession* of their property because their previous naked ownership had become perfect ownership.¹⁸ Instead, he retained possession and then sold the whole property to Léon Boudoin, a son of his second marriage.

Insofar as the undivided half which was not his, and in which he no longer had any legal property interest, the father's sale was null and conveyed nothing.¹⁹ At that point, the children of

13. *Kaffie v. Wilson*, 130 La. 350, 57 So. 1001 (1911).

14. 159 So.2d 52 (La. App. 1st Cir. 1963).

15. Note, 24 LA. L. REV. 885 (1964).

16. 154 So.2d 239 (La. App. 3d Cir. 1963), *writ refused*, "no error of law," 245 La. 54, 156 So.2d 601.

17. LA. CIVIL CODE art. 916 (1870).

18. *Id.* arts. 533, 535, 625.

19. *Id.* art. 2452.

the first marriage could have claimed their property, as well as damages against the father for his failure to restore possession to them and for his wrongful disposition. The court's statement that "they certainly could not seek from him [the father] the return of their interest in the property. He never owned it. . . ."²⁰ fails to separate the concept of possession from that of ownership. And by continuing with the statement that "the only possible recourse which the six heirs had against Pierre Boudoin was to seek whatever money damages they had suffered by reason of this attempted sale of their property,"²¹ the court consolidated the oversight of the father's obligation to deliver the possession of the property to its legal owners. On the face of the court's statement, a usufructuary would have the choice of delivering possession to the naked owners or of selling the property and paying damages. This passes over too blithely the vital issue of title to the property itself.

The argument is made that a co-owner in indivision may possess the whole property, and therefore as co-owner the father was not under any obligation to deliver possession to the children. However, there are two fallacies in this reasoning: (1) the father is not only a co-owner but also a former usufructuary, and his position as co-owner does not extinguish his obligations as former usufructuary; and (2) while a co-owner in indivision *may* possess the whole property, he has no *protected right* to do so, because the other co-owner can demand partition at any time.

When a person makes a warranty sale of property belonging to another, he conveys nothing because the sale is null.²² The real owner can reclaim his property from the vendee, and the vendor's warranty obligation is resolved in damages in favor of the vendee.²³ The vendee does not have the choice of either keeping the property or claiming damages.

It is then argued that when the children of the first marriage unconditionally accepted their father's succession, they became "estopped" to claim their property. Estoppel is not a part of the Louisiana civil law, and the source references are to its home in the common law. This does not preclude the pro-

20. 154 So. 2d at 249.

21. *Ibid.*

22. LA. CIVIL CODE art. 2452 (1870).

23. *Ibid.*

priety of utilizing the concept of estoppel in situations where there are gaps in our law²⁴ for which estoppel provides a socially desirable solution in conformity with the express Louisiana law. In the case under discussion, there are express rules of Louisiana law which oblige a usufructuary to deliver possession of the property at the termination of the usufruct,²⁵ which declare null the sale of the property of another,²⁶ and which provide for restitution of the price and for damages against a warranty-vendor who does not convey any title.²⁷ In the presence of these express rules of Louisiana law, it is neither necessary nor appropriate to reach for solutions in the common law or any other source. As for the heritable obligations of unconditional heirs, that is a subsequent and separate issue, and the vendee's recovery should be limited to a restitution of the price, because the vendee-son Leon must have known all the facts of the family history and relationships; and since ignorance of the law is no excuse, he should not be entitled to recover any damages resulting from his invalid purchase because he could not assert that he "knew not that the thing belonged to another person."²⁸

In the last paragraph of Judge Tate's concurring opinion on rehearing, he invited a showing that "the father was at the time of his death under a duty to restore to the six major heirs their property."²⁹ The answer to this inquiry lies in separating the concepts of "possession" and "title" to the property in question. Of course, the father never had title to the share of which the children were naked owners, but he was in lawful possession as usufructuary, and he was under a duty to deliver the possession to the naked owners at the termination of his usufruct. This obligation is not extinguished by his separate status as a co-owner in indivision.

SERVITUDES

When a right of way is established in a "right of way deed," it must be ascertained whether this creates only a servitude or whether there is a conveyance of full ownership. In the absence of an express or clear intent to transfer title, the grant is inter-

24. LA. CIVIL CODE art. 21 (1870).

25. *Id.* arts. 533, 535, 645.

26. *Id.* art. 2452.

27. *Id.* arts. 2506, 2452.

28. *Id.* art. 2452.

29. 154 So. 2d at 253.

preted as a servitude. A significant point in this determination is that a servitude is extinguished by ten years non-use,³⁰ restoring perfect ownership to the proprietor, whereas an owner of property does not lose any of his rights by mere non-use.³¹ Since the grant in both cases constitutes a giving up of certain property interests, it is proper to interpret any doubt or ambiguity in favor of the landowner rather than in favor of the grantee. These principles were reviewed and considered in the case of *Mitchel v. Board of Commissioners of the Jefferson and Plaquemines Drainage District*³² and applied to the public agency in the same way as between private individuals.

In *Nelson v. Warren*,³³ there was a community driveway between two properties, and at the request of the defendant the trial court had relocated the servitude entirely on the defendant's property leading directly into the defendant's new carport, and on the defendant's side of a fence which defendant constructed down the middle of the original driveway. This required plaintiff to cross over at an angle from defendant's property to reach his own garage, and the court of appeal agreed with the plaintiff that this would not be "equally convenient" within the meaning of Civil Code article 777. Accordingly, the defendant was ordered to remove the fence and to permit the continued use of the community drive in its original location.

Only by reference to each situation can it be determined when the acts of one proprietor in the use of his property "may be the cause of any damage" to his neighbor, within the meaning of Civil Code article 667, or when the action is permissible within article 668 "although it should occasion some inconvenience." (Emphasis added.) In *Williams v. Beverly*,³⁴ the defendant constructed an unsightly fence on his own side of the property line but made it look as if it were the plaintiff's fence. The plaintiff's demand for its removal was refused. The significance of this decision as a contribution to the law is in the distinction between this fact situation and that in the prior case of *Parker v. Harvey*.³⁵ In the *Parker* case, the fence was ordered

30. LA. CIVIL CODE art. 789 (1870).

31. *Id.* art. 496.

32. 161 So. 2d 384 (La. App. 4th Cir. 1964).

33. 157 So. 2d 762 (La. App. 2d Cir. 1963).

34. 160 So. 2d 291 (La. App. 1st Cir. 1964).

35. 164 So. 507 (La. App. 2d Cir. 1935).

removed because it was shown to have an injurious effect on the plaintiff's business, while not serving as any benefit to the defendant. In the *Williams* case, the court found no interference or injury to the plaintiff, whereas there was reason to expect that the fence would serve some useful purpose with respect to controlling children and pets.

BUILDING RESTRICTIONS

Prior to 1960, one objecting landowner could enforce a valid building restriction against another owner who had committed, or was about to commit, a violation within the subdivision affected. By Act 448 of 1960, amending R.S. 9:5622, the legislature empowered the owners of a majority of the square footage of the land in a subdivision to terminate a restrictive covenant under certain conditions. An individual is no longer assured of the protection he counted on, and to this extent his property interest is subject to the decision of a majority of his neighbors. It is not surprising that the constitutionality of the statute was attacked in *Johnston v. Frantom*,³⁶ but it is surprising that the court should sustain the statute with merely the brief and blunt statement that "the Act in question is not unreasonable, arbitrary or capricious."³⁷ Considering the importance always attached to the rights of private property, and the deprivation of the property interest of the objecting minority landowners, the question of the constitutionality of the statute merits at least something of a judicial discussion in support of the first affirmative conclusion on this issue.³⁸

In *Willis v. New Orleans East Unit of Jehovah's Witnesses*,³⁹ there was a large subdivision containing several hundred lots with a restrictive covenant limiting construction to single-family dwellings for residential purposes. Thereafter, every one of the landowners gave written consent to exclude two of the original squares from this restriction in order to permit use of the land for a church and a school. Sometime later, another religious denomination proposed to construct a church on a lot within this subdivision, claiming that the re-

36. 159 So.2d 404 (La. App. 2d Cir. 1963).

37. *Id.* at 405.

38. In *In re* Congregation of St. Rita Roman Catholic Church, 130 So.2d 425, 428 (La. App. 4th Cir. 1961), this question was expressly pretermitted because Act 448 of 1960 had no application there.

39. 156 So.2d 310 (La. App. 4th Cir. 1963).

striction against the construction of a church had been waived by all the parties. However, the injunction against them was sustained. The earlier waiver was only a single instance of departure from the residential covenant out of several hundred lots in the subdivision; this could certainly not be evaluated as substantially defeating the general plan.

In *Leonard v. Lavigne*,⁴⁰ there was a recorded lease in which the landowner bound himself, and his heirs and assigns, not to make competitive use of any of his adjacent property. This stipulation was breached, and the question was whether the restriction was a covenant running with the land or merely a personal obligation. The trial court said it was merely a personal obligation; the court of appeal held it was a covenant running with the land. The Supreme Court affirmed the judgment of the district court, finding that the court of appeal had relied on common law sources. The Supreme Court stressed the reminder that "while these rules of common law jurisprudence are sometimes persuasive, they are not controlling under our system of civil law, particularly since we have codal provisions that are to the contrary."⁴¹

There is the "real obligation" which attaches to immovable property under Civil Code article 2010, but the lease provision in the case under discussion was clearly a personal obligation. Building restrictions are recognized as limitations on the use of land and are likened to servitudes, but real servitudes constitute relationships between estates belonging to different owners and cannot exist between a lessor and lessee.

SUCCESSIONS AND DONATIONS

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VALIDITY OF TESTAMENTS

In *Succession of Anderson*¹ the validity of a statutory will was contested on the ground that it had not been signed by the testator. The testament contained the testator's declaration that

40. 245 La. 1004, 162 So. 2d 341 (1964), reversing 153 So. 2d 544 (La. App. 1st Cir. 1963).

41. *Id.* at 1007, 162 So. 2d at 343.

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1. 159 So. 2d 776 (La. App. 2d Cir. 1964).